

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1450

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

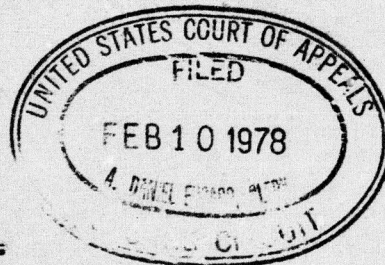
WILLIAM LACEY,

Appellant.

B P/S

APPELLANT'S BRIEF

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IN EXCLUDING FROM THE JURY'S CON-
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-against-

WILLIAM LACEY,

Appellant.

ISSUES PRESENTED

1. *Whether or not the trial Judge committed error when he gave Two (2) Allen Charges.*
2. *Whether or not the trial Judge abused his discretion when he excluded exhibits offered by the Appellant from the juries consideration.*
3. *Whether or not the Government proved beyond a Reasonable Doubt that Appellant possessed a Schedule II Narcotic Drug with intent to distribute.*

STATEMENT PURSUANT TO RULE 28 (a) (3)

Preliminary Statement

A. This appeal is from a judgment of the U.S. District Court for the Southern District of New York (Cannella, J) rendered on November 7, 1977 convicting Appellant after trial of distributing and possessing with intent to distribute a schedule II Narcotic Drug controlled substance (Title 21 U.S. Code Section, 812 841 (a) (1) and 841 (b) (1) (A) and Title 18, U.S. Code, Section 2), and sentencing the Appellant to a term of imprisonment for a period of two and one-half (2 1/2) years and a special parole period of three (3) years.

Timely notice of appeal was filed on October 25, 1977.

Appellant William Lacey is presently on bail pending the determination of his appeal.

Statement of Facts

B. Appellant was originally charged in two (2) counts of a four (4) count indictment with one count of conspiracy to violate the narcotics law of the U.S., and one count of distributing a schedule II narcotic drug controlled substance on or about January 1976.

The Appellant and four (4) others were indicted as co-conspirators and Appellant and a Milton Thompson were also charge in a sub

substantive count of distributing and possession with the intent to distribute, and co-defendants Richard Paglialonga and Edward White were each charged in separate counts with narcotic violations. ^{1/}

The Appellant and co-defendant's proceeded to trial before Brieant J. on July 20, 1977. At the conclusion of the government's case the Appellant's motion for acquittal of the conspiracy count (count I) under Rule 29 was granted. During the course of evidence being presented on behalf of co-defendant Richard Paglialonga Appellant moved for a mistrial as to the substantive count of distributing and possession with intent to distribute (count II) and the motion was granted. The one remaining charge was then referred to Cannella, J. for re-trial. ^{2/}

C. On September 14, 1977 the second trial was commenced before Cannella, J.

The principal witnesses against the Appellant were Harvey Cohen and Marsha Brown.

^{1/} The four (4) count indictment charge Appellant William Lacey, Edward White, Richard Paglialonga, Ilene Baker, and Milton Thompson a/k/a Skip, in the first count with conspiracy; Richard Paglialonga and Edward White were named in other counts of the indictment; Milton Thompson and Edward White are fugitives and were not brought to trial.

^{2/} Co-defendant Ilene Baker was acquitted; co-defendant Richard Paglialonga was convicted of conspiracy and acquitted of possession with intent to distribute a schedule II narcotic drug.

There was testimony that Richard Paglialonga and Brown had gone to Peru on a previous occasion during which time Paglialonga had buried two or three packages of powder [266,267 (1-14)]. That on a cliff on the second occasion that Paglialonga went to Lima, Peru he dug up the package he had buried on the cliff and gave the package to Cohen [268 (1-21)]

Cohen testified that a suitcase had been constructed by Brown to be used to smuggle the cocaine. [177 (20-25) 178 (1-14)]

Cohen and Paglialonga went to Peru, South America to retrieve the bags that were buried by Paglialonga . [TR 267 (15-16) [After they arrive in Peru Paglialonga digs up the bags [267 (15-21)] and Cohen places them into the suitcase that had been specially constructed by Marsha Brown [TR 137 (24-25) 138 (1-3)]

*Cohen further testified that in December 1975 he and Richard Paglialonga went to South America, Lima Peru during which time Paglialonga brought to Cohen, a tennis racket cover containing white powder in bags [TR 136 (1-8)] **

Cohen testified that by prearrangement an ^{3/}Illene Baker met Cohen in Curacas where Baker takes the suitcase and brings it back to

** Reference is to trial transcript page and line
3/ see footnote #1.*

New York to Harvey Cohen's and Marsha Brown's apartment. [TR 140 (17-18) 142 (24-25) 143 (2-3)]

Harvey Cohen return to New York in January 1976. After his arrival he opened the suitcase, removed the plastic bags and repackaged the contents into sixteen (16) or so one-ounce plastic bags. [TR 150 (11-14)]

Cohen testified that a few days later he received a call from some one who identified himself as Billy. That the caller stated that he was coming over to Cohen's apartment. [151, 152 (5-7)]

There was testimony that some time after the call two men arrived at Cohen's apartment. The two men displayed guns, and the man who identified himself as Billy tells Cohen that he wants the bags that were brought back from Peru in repayment of money he expended to get Ed White out of jail. [TR 18 (10-25), 19, 20, 21 (1-3)] [TR 158 (1-12) 159 (5-17)] 161] That Cohen gave the man seven (7) of the one-ounce bags claiming that was all he had [162 (3-11)]. The two men then left.

Cohen testified that the next day that Billy returned saying a package was short at which time Billy gave Cohen the short package and Cohen gave Billy a one-ounce package. [TR 166 (11-25) 167]

Paglialonga testified that he was in Cohen and Brown's apartment in January 1976 when two (2) men came in. That the two (2) men remained in the apartment for a while and then left [TR 273-279] He further testified that he was unable to identify any of the men.

Cohen and Brown made an in-Court identification of Appellant as being the man called Billy, the man who took seven (7) packages from the apartment. [TR 34 (16-22) 172 (22-25) 173 (2-6)]

There was further testimony that Cohen and Brown sold a quantity of narcotic drugs to an undercover Police Officer by the name of John DeRosa on February 4, 1976 and February 6, 1976 [TR 113-117]

On August 10, 1976 Brown and Cohen were negotiating a sale of drugs to the undercover police officer when they were placed under arrest for violation of the narcotic laws of the State of New York. [TR 22, 117 (23-24)]

Cohen and Brown were each indicted by New York State and charged with violating the New York State Narcotic Laws. [TR 22]

In the meantime both Cohen and Brown had begun cooperating with the Drug Enforcement Agency. [TR 48, 200 (7-9)]

Cohen, Brown and DeRosa testified that Cohen, and Brown first mentioned their Peruvian source for drugs in January 1977. And there

was further testimony that they did not mention the episode where two men came in with guns until February 1977. [TR 107 (2-6)]

A New York City Police Officer by the name of William Minett testified that on February 19th, 1976 he saw in New York City the Appellant in the company of another man named Milton Thompson, who was also known as Skip .

There was testimony that on February 15, 1977 the witnesses Cohen and Brown were shown a photo spread and they each picked out Appellant as the man named Billy, and picked out Thompson as the man named Skip.

The Appellant was arrested on April 15, 1977 and proceeded to trial the first time on July 20, 1977.

The Appellant did not take the stand and offered no testimony and offered no witnesses.

BAIL STATUS OF DEFENDANT-APPELLANT

Defendant-Appellant is presently free on \$50,000.00 Bail pending the determination his appeal.

POINT I

THE TRIAL JUDGE GAVE THE JURY TWO (2) MODIFIED ALLEN CHARGES WHICH WAS COERCIVE

The jury after deliberating for a period of time sent a note to the Court that it was "hopelessly deadlocked". (TR 425) Whereupon the judge then proceeded to give a modified Allen Charge. (TR 429)

The charge as given on both occasions was defective, prejudicial and was an intrusion into the functioning process of jury deliberation.

U.S. v. FIORAVANTI 412F2d 407 at 417, (1969)
JENKINS v. U.S. 380 U.S. 445 (1965)

The Court by its own admission indicated to the jury that the case presented a simple factual issue for them to determine. (TR 429 (22))

The trial of the case was not lengthy and extended; there was not a massive volume of technical documentary evidence to examine; nor was there a large number of witnesses whose testimony required a prolonged analysis and evaluation. The Court further remarked that the issue that was apparently interfering with the jury's reaching a unanimous verdict was the failure to reach agreement as to the defendant's guilt beyond a reasonable doubt. (TR 430 (3-6))

The Court's projecting the Reasonable Doubt question as being pivotal is a direct interference into the function and operation of the

jury's determinant of the facts. There was no request by the jury to define or explain Reasonable Doubt. Therefore, the Court on its own initiative attempted to identify the problem and then proceeded to attempt to solve it by a judicial invasion into the exclusive province of the jury.

GREEN v. U.S. 309 F2d 852 at 856 (1962)

The First Allen Charge as given is one-sided in that it imposes on the dissenting juror the responsibility to re-examine his belief in light of his difference from those in the majority. "It contains no admonition that the majority re-examine its position. It cautions only the minority to see the error of its ways."

U.S. v. FIORAVANTI, *Supra* p. 417

There was some reference, for the majority to re-examine their judgment, however, the ambiguity in its presentation coupled with the apparent retraction or cancellation of same by the Judge:... "That's repetitious..." (TR 431 (9)) made the instruction on this important subject in effective and meaningless. Accordingly, the jury was given a false notion of the validity and force of majority opinion thereby prejudging the right of an accused to the free and unencumbered conscientious judgment of a dissenting juror.

In addition to the foregoing there was an added defect on the modified Allen Charge as given. The charge as given does not emphasize

the importance of an individual juror's honest judgment and conscience. It invites the surrender of a juror's honest judgment as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

GREEN v. U.S. Supra at 854
THAGGARD v. U.S. 354 F 2d 735 at 739 (1965)
U.S. v. MEYERS 410 F 2d at 697 (1969)
SANDERS v. U.S. 415 F 2d 621 at 631 (1969)
See: Judge Brown's Dissent in HUFFMAN v. U.S. 297 F2d
754 5 Cir. (1962)

The juror's judgment should not be influenced by the Court.

JENKINS v. U.S. Supra

Each juror has a duty to conscientiously adhere to his honest opinion.

THAGGARD v. U.S. Supra 739
GREEN v. U.S. Supra

2nd ALLEN CHARGE

After further deliberation the jury then informed the Court that they were "unable to reach a verdict." (TR 441 (16)) Whereupon, the Court gave the jury a Second Modified Allen Charge. (TR 444 (14)) Those cases where the Allen Charge has been upheld in this circuit the Court has, included in said charge, with emphasis, that under no circumstances must any juror yield his conscientious judgment.

U.S. v. MEYERS 410 F 2d 693 (1969)
U.S. v. KENNER 354 F 2d 780 (1965)

Neither this language nor any statement of similar significance was used in the modified Allen Charges given in the instant case. The 2nd charge was essentially the same as the charge given previously with certain minor changes relating to majority and minority opinions. The evils inherent in the first Allen Charge were similarly present in the 2nd Charge. Moreover, the 2nd Charge becomes even more coercive because of its failure to emphasize the importance of an individual judgment and conscience.

GREEN v. U.S. Supra
SANDERS v. U.S. Supra 631

See: Dissenting Opinion: Oakes, J.
U.S. v. CECIL ROBINSON
Slip Opinion P. 5056

and was clearly designed to impose upon the dissenting juror the Court's compelling influence to join with the majority in sacrifice of the individual's conscientious belief.

GREEN v. U.S. Supra 855

The propriety of the Court's giving an Allen Charge is determined mainly by the facts of the individual case.

POWELL v. U.S. 297 F 2d 318 (5th Cir)

In the instant case the factual issue for the jury's consideration was a simple uncomplicated factual question. This was expressed by the trial judge. In addition thereto, the Court and the Prosecutor expressed their respective unwillingness to have the jury deliberate past a given time; (TR 443 (L23-24)) (TR 443 (L 11-14)) which time came and went and in spite of the Court's commitment to discharge the jury after the appointed time, the Court did in fact direct them to discontinue deliberation for that day, go home, and return the following day for continual deliberation (TR 451 (L12-23)). This coercive act by the Court undoubtedly impressed in the mind of a dissenting juror that the Court would not accept anything less than a unanimous verdict. The accused has the right to have a jury speak without being coerced.

*JENKINS v. U.S. Supra
U.S. v. THOMAS 449 F 2 1177 at 1181*

Therefore the trial judge's influence was added to the side of the majority which leads to the conclusion that there was impermissible coercion.

Any undue intrusion by the trial judge into [the] exclusive province of the jury is error of the first magnitude.

U.S. v. THOMAS Supra

It is improper for the Court to interfere with the jury by pressuring jurors to sacrifice their conscientious scruples for the sake of reaching agreement.

GREEN v. U.S. Supra

Therefore, the Court's intrusion into the sole province of the jury was compounded by the giving of a 2nd Allen Charge, and quoting from Judge Coleman in his dissenting opinion in THAGGARD v. U.S. Supra

"...the essential meaning of constitutionally guaranteed trial by jury is that once the jury has retired to consider of its verdict it should not be subjected to so much as the appearance of any interference from any source for the purpose of producing a verdict. The jurors should be left to the unhampered expression of their own consciences, independently arrived at."

Accordingly, the two Allen charges as given were coercive on the deliberation of the jury and the verdict entered in this case should be set aside and the case remanded to the District Court for a retrial.

POINT II

THE TRIAL COURT COMMITTED ERROR
IN EXCLUDING FROM THE JURY'S CON-
SIDERATION EXERPTS FROM A BOOK
WRITTEN BY HARVEY COHEN

CREDIBILITY

The credibility of Government witnesses Harvey Cohen and Marsha Brown was crucial in determining the factual issue in this case.

(TR 430 (3-6))

They both were admitted drug smugglers; they both had been indicted for A-I Felonies and both had pleaded guilty in State Court to A-III Felonies;^{1/} (TR 23 (4-5)) And, both Brown and Cohen began co-operating with the government. (TR 200 (7-8))

Furthermore, witness Cohen had authored a paperback book on the use of drugs.^{2/} (TR 209-210). In relation to this Cohen and Brown were questioned on cross examination about his drug usage. There was an attempt to reveal that his vague answers and his responses were less than true by presenting to the jury certain pertinent exerpts from the book he authored (TR 211 (2-13)).

The trial Judge would not permit the offer of these relevant exerpts for the jury's examination.

^{1/} N. Y. Penal Law Section # 220.21, 220.16 states as follows:

A-I Felony: Crim. Poss. of a Dang. Drug in the 2nd degree

A-III Felony: Crim. Poss. of a Controlled Sub. in the 3rd Degree.

^{2/} The Amphetamine Manifesto, by Harvey Cohen, Olympia Press, 1972.

The exclusion by the Judge of relevant portions from the book that the witness admittedly had written and admittedly was a recitation of his and Brown's true experience, prevented the jury from examining significant evidence that had a direct bearing on the credibility on both government witnesses Cohen and Brown. This was not a collateral matter but had direct bearing on the credibility of both Cohen and Brown.

The proffered exhibits would have provided a dimension of the character of the witnesses that the witnesses had not displayed. The exhibits revealed that they lied about the extent of their drug usage; that they were thoughtfully enmeshed in the drug underworld and drug culture.^{3/}

With regards to questions of credibility the trial judge should permit any relevant evidence that presents to the jury matters that touch on the credibility of a witness.

In a case where the important issue is credibility of a witness it is error for the Court to exclude from the jury's consideration evidence that relate to such witness' credibility.

✓ ^{3/} Ibid, pp 4, 5, 6, 7, 8, 9, 21, 24, 25, 27, 28, 29, 92, 93, 100, 101, 108, 112, 113, 116, 117, 144.

Therefore, the trial Court committed error and abused his discretion in excluding from the jury's consideration the excerpts from the book written by Cohen.

POINT III

THE GOVERNMENT FAILED TO PROVE THAT
THE APPELLANT POSSESSED A SCHEDULE II
NARCOTIC DRUG WITH THE INTENT TO DIS-
TRIBUTE

PROOF OF POSSESSION

There was testimony from the government witness, Harvey Cohen that there were several packages containing a white powder placed into a suitcase in Peru, South America, brought to his apartment in New York, (TR 140-142) and from these packages he did then re-packaged the contents within the these packages in 17 to 18 one-ounce packages. (TR 182 (18)).

He further testified that seven (7) of these packages were taken from his premises by the Appellant (TR 162) and five (5) of these one-ounce packages of which he retained custody wer sold to the undercover police officer John DeRosa. (TR 167 (25) 166 (3)) There was expert testimony that the packages sold by Cohen and Brown contained cocaine, a Schedule II Narcotic Drug. (TR 310 (17-21))

Significantly, there was testimony by Cohen that a portion of ^{1/} the cocaine that came into his possession came from a Richard Connerty a person who was in no way connected with the Appellant. Therefore, at best, there is testimony from Cohen that Cohen's narcotics emanated

^{1/} Richard Connerty was indicted separately and was acquitted by a jury after trial of all counts of an indictment charging him with possession and possessing with intent to distribute, a Schedule II Narcotic Drug

from at least two (2) different sources: Peru and Richard Connerty. There was no independent proof offered to establish that the drugs Cohen obtained from the Peruvian or Connerty sources were not all dissipated by him nor that any quantity of drugs that were taken from him was in the amount that he testified.

There was no evidence, testimony or proof of any sort offered other than the testimony of Cohen, Brown and Richard Paglialonga^{2/} to establish that whatever packages that were removed from Cohen's apartment if in fact such an event did occur, that those packages did in fact contain a narcotic drug.

There wasn't any proof offered that the packages allegedly removed by the defendant were ever seen again or that he maintained possession of them for any length of time.

In order to sustain a conviction for possession of a narcotic drug with intent to distribute there must be clear and convincing proof that the substance possessed is a narcotic drug.

There wasn't proof offered to connect the packages and their content, allegedly removed by Appellant, with the package that the

^{2/} Richard Paglialonga was a co-defendant in the first trial, was convicted on the conspiracy count and acquitted on the substantive count of possession of a Schedule II Narcotic Drug.

government witnesses Brown and Cohen sold to the police officer.

There must in the first instance, be a connection between the package that Cohen and Brown sold and the packages that the Appellant is supposed to have removed. There is nothing to connect what ever it was that was removed, even if such an event is assumed for argument purposes, with what was left or what remained other than from the testimony of Cohen and Brown.

Even if the evidence is takne in light most favorable to the government the proof is insufficient to connect the drugs possessed by Cohen and Brown with the Appellant.

CONCLUSION

THE JUDGMENT OF CONVICTION S HOULD BE
REVERSED AND THE INDICTMENT DIS MISSED
OR IN THE ALTERNATIVE REMANDED TO THE
DISTRICT COURT FOR A NEW TRIAL.

Respectfully Submitted,

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New York, New York 10012
(212) 226-3000

WELLS

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of Feb., 1978 at No. 1 St. Andrews Pla, NYC

deponent served the within *BRIB*
upon U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering ³ true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
10 day of Feb. 1978

Edward Bailey
Edward Bailey

W. Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARMANDO MONTANO, et al

against

LOUIS J. LEFKOWITZ, et al

Plaintiff
Appellants

Respondents
~~Defendants~~

Index No. 78-7033

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 2720 Grand Concourse,
Bronx, New York 10458

That on the 16th day of February 19 78 deponent served the annexed
Brief for Respondent, Democratic Committee of Bronx County
on John C. Klotz
attorney(s) for Appellants
in this action at 30 Rockefeller Plaza (Suite 1914), New York, New York 10020
the address designated by said attorney(s) for that purpose by depositing a true copy of said enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this 16 day of February

19 78

Marie Picone

Elizabeth K. Salony
The name signed must be printed beneath

Elizabeth K- Salony

MARIE PICONE
COMMISSIONER OF DEEDS
City of New York 3-536
Cert. Filed in Bronx County
Commission Expires May 1, 1978

Index No.

Plaintiff

against

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

The name signed must be printed beneath

Attorney at Law

